83-314

Office Supreme Court, U.S.
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NUMBER: _____

IN THE SUPREME COURT OF THE UNITED STATES

1983 TERM

ANTHONY OSTRIC, Petitioner,

VERSUS

THE CORPORATION OF ST. MARY'S COLLEGE

NOTRE DAME ET AL., Respondents.

ON WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ANTHONY OSTRIC

Pro se

1114 FOSTER AVENUE

SOUTH BEND, IN 46617

219-234-9713

QUESTIONS PRESENTED FOR REVIEW

In its opinion* regarding the instant case, the Seventh Circuit Court of Appeals declared:

> The question of whether to dismiss a complaint for failure to amend rests within the sound discretion of the district court. The district court will not be reversed absent a showing of abuse of discretion. See Carl Locasio v. Teletype Corporation, No. 82-1354, slip op. (7th Cir. Dec. 2, 1982), Beshear v. Weinzapfel, 474 F.2d 127 (7th Cir. 1973). The plaintiff in this case was ordered to file an amended complaint within sixty days. The plaintiff never filed an amended complaint, but instead appealed the judge's order to this court, filed a motion for relief from judgment, and a motion for determination of plaintiff's entire case. In short, plaintiff did everything but file an amended complaint. Nine months after the court ordered the plaintiff to amend the complaint, the district court granted the defendants' motion to dismiss /sic/ for failure to amend /sic/ complaint. We cannot conclude that the district court abused its discretion in dismissing plaintiff's case. Pavilonis v. King, 626 F.2d 1075 (1st Cir. 1980).

The questions for review are:

I. Whether, within the meaning of Rule 17.1 (a) of the Supreme Court of the United States, this Court of Appeals "has so far departed

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* App. A. in Appendices, I., pp. 19a-20a.

from the accepted and usual course of judicial proceedings, . . . /as well as/ so far sanctioned such departure by . . . /the trial/ court, as to call for an exercise of this /Supreme/ Court's power of supervision" in the instant case.

A. Whether, in sanctioning the Trial Court's decisions, particularly by affirming the dismissal of this case "due to plaintiff's failure to amend the complaint pursuant to the court's order", the Court of Appeals rendered a decision "in conflict with applicable decisions of . . . /the Supreme/ Court" of the United States, within the meaning of Rule 17(c) of the latter.

B. Whether this Court of Appeals grossly misapprehended and/or mispresented the facts relevant to the issues presented for review, based its decisions on such misapprehension of the facts, and failed to adhere to proper procedure in reaching a decision in dealing with the fundamental issues that follow.

1. Whether the Petitioner's Complaint gave the Defendants (Respondents) "fair notice of what . . . /his/ claim is and the grounds upon which it rests . . .";*

2. Whether there existed (a) a continuing and civil conspiracy against the Petitioner under 42 U.S.C. §§ 1983, 1985, and 1986 (b) engaged in by all Defendants and (c) the Petitioner's other closely interrelated claims stemming from the same conspiracy;

3. Whether the Defendants' (Respondants') Motions to Dismiss are valid and, assuming as the Court below held, that they are, whether the Trial Court resolved all matter of doubt in favor of the Plaintiff (Petitioner);

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* Conley v. Gibson, 78 S.Ct. at 103, 355 U.S. at 48 - cited by Wright, Charles Alan, Handbook of the Law of Federal Courts, (Third Ed., 1976), p.323.

4. Whether the proper course for the Plaintiff (Petitioner) in the instant case in which Defendants failed to answer was to move for a default judgment under Federal Rule of Civil Procedure 55;

5. Whether the U.S. Magistrate was authorized, under the circumstances in the instant case, to conduct hearings on Defendants' dispositive pretrial Motions to Dismiss and to submit to the Trial Court's judge proposed findings of the facts and conclusions and recommendations under 28 U.S.C. §§ 636(b) and (c) without consent of the parties;

6. Whether the proper course (1) for Defendants in the instant case in which they failed to answer, or before the pleadings were closed, was to seek a judgment on the pleadings "pursuant to Rule 12(c) and (h) F.R.C.P.", (2) for the Trial Court to grant such a judgment, and (3)

for the Court of Appeals to sanction it.

II. Whether the Trial Court's proceedings together with the decisions below taken as a whole, including deprivation of Petitioner's constitutional rights, particularly those of freedom of speech, due process of law, and "right to jury determination",* represent "a gross miscarriage of justice". **

A. Whether the management of the judicial administration was performed by the Courts below in a way as to seek truth and justice in accordance with the provisions of Federal Rules of Civil Procedure "to secure the just, speedy and inexpensive determination of . . . /Petitioner's/ action", within the meaning of Rule 1 of

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* Rogers v. Missouri Pacific R. Co., 352 U.S. 500, 510 - cited by Stern, Robert L. and Eugene Gressman, Supreme Court Practice, Fifth Ed. (1978), p.293.

** E.G. Thompson v. City of Louisville, 362 U.S. 199; Washington v. United States, 357 U.S. 348 - cited by Stern and Gressman, id., p. 299.

the latter, or were they involved in systematic distortion of the truth and obstruction of justice - through the Trial Court's action and the Court of Appeals' sanction -

1. In granting Defendants' Motions to Dismiss;

2. In not entering default judgment sought by the Petitioner against Defendants;

3. In ordering that the Petitioner file an amended complaint;

4. In denying the Petitioner's "Motion for Determination of the Plaintiff's Entire Case . . .";

5. In failing to rule upon the Petitioner's "Motion for Reversal or Amendment of the Court's Order of December 4, 1981";

6. In considering the Defendants' "Motion for Judgment on the Pleadings for Failure to State a Claim Upon Which Relief Can Be Made" as a bona fide motion and granting it;

7. In entering, on December 7, 1981, a final order of dismissal "due to plaintiff's failure to amend the complaint pursuant to the court's order"; and

8. In denying by its order of January 6, 1982 the Petitioner's "Motion For Relief from Judgment and Order" without any explanation.

List of other parties to this case besides those included in the caption on the cover is as follows: the Congregation of the Holy Cross, Notre Dame; William A. Hickey, Vice-President and Dean of Faculty of St. Mary's College, Notre Dame; Rita Mary Cassidy, Professor of this college; Donald M. Horning, Professor of this college; John M. Duggan, President of this college; Jason D. Lindower, Controller of this college; Michael R. McKee, Professor of this college; Sr. Rose Bernard Tarleton, Professor of this college; Thornburg, McGill, Deahl, Harman, Carey and Murray, legal firm; Frederick F. Thornburg, associate of this legal firm; Thomas C. Murray, associate of this legal firm; Indiana Civil Rights Commission (hereinafter ICRC); Mary W. Shafer, Commissioner of the ICRC; J.L. Maynard, Director of the ICRC; John C. Carvey, Chairperson of the ICRC; Theodore L. Sendak, Attorney General of Indiana; and John W. Montgomery, Judge of St. Joseph Circuit Court of South Bend, Indiana.

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OPINIONS BELOW

The opinion of the Court of Appeals (App. A, pp. 1a-21a) is not reported. The opinion of the District Court (App. B-F, pp. 22a-35a) is not reported. The opinion of St. Joseph Circuit Court, South Bend, Indiana (App. H, pp. 37a-38a) is not reported. The opinion of Indiana Civil Rights Commission (App. I-K, pp. 39a-46a) is not reported.

STATEMENT OF JURISDICTION

The judgment of the court of appeals (App. L, pp. 47a-48a) was entered on March 1, 1983. A petition for rehearing was denied on March 28, 1983 (App. M, pp. 49a-50a). On May 23, 1983, Honorable John Paul Stevens, Associate Justice of the Supreme Court of the United States extended the time within which to file a writ of certiorari to and including July 29, 1983, and on May 31, 1983, the same Associate Justice further extended the time for filing a petition for writ of certiorari to and including August 25, 1983. A motion for exten-

sion of time to file petition for rehearing was denied on March 23, 1983 (App. N, pp. 51a-52a). Judgment for the district court (App. C, pp. 53a-54a) was entered on December 7, 1981. The judgment of St. Joseph Circuit Court, South Bend, Indiana (App. P, p. 57a) was entered January 29, 1979. A motion for relief from order was "overruled" by St. Joseph Circuit Court (App. Q, p. 62a) on April 26, 1979. An appeal was dismissed by a commissioner of the ICRC "who at the same time . . . affirmed (/its/ Director's findings)" on October 10, 1978 (App. I, p. 42a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1), of the Court of Appeals under § 1291 and that of the District Court under § 1331, supra - Federal question.

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

The pertinent parts of the text of the following Constitutional Provisions, Statutes, Ordinances involved in the instant case are

set forth in Appendices, II. .

1. U.S. Const. Art. I, sec. 10. cl. 1, Art. III, sec. 2, Amend. I, Amend. V, Amend. VII, Amend. XIV, sec. 1 (App. A*, pp. 181a-182a).

2. "Civil Rights": Civil Rights Act of 1964, sec. 703(a)(1)(2), sec. 704(a); 42 U.S. C. § 2000e-2.(a), § 2000e-3.(a) (App. B*, pp. 183a-184a); 42 U.S.C. §§ 1983, 1985(b)(c), 1986 and 1988 (App. C*, pp. 185a-189a); Age Discrimination Act of 1967, sec. 623(a), sec. 623(b) (App. D*, p. 190a); Indiana Civil Rights law IC 1971, 22-9-1 (App. E*, pp. 191a-197a).

3. Federal Magistrates Act of 1979 (Supp. 1980), 28 U.S.C. § 636(b) and § 636(c) (App. F*, pp. 198a-202a); Magistrates Rules of the U.S. District Court for the Northern District of Indiana (App. G*, pp. 203a-205a).

4. Administrative Adjudication Act of the State of Indiana - IC 1971, 4-22-1 (App. H*, pp. 206a- 217a).

5. Articles of Incorporation of the Corpo-

ration of St. Mary's College, Notre Dame (App. I*, pp. 218a-223a).

6. Contractual Agreement between St. Mary's College, Notre Dame, IN and the Petitioner (App. J*, pp. 224a-229a).

STATEMENT OF THE CASE

The Petitioner, Anthony Ostric, a former full professor of Anthropology and Sociology at St. Mary's College, Notre Dame, Indiana, is certain that, in the instant case, the decisions below, including court's denial of the Petitioner's right of trial, in particular, his right of trial by jury, represents "a gross miscarriage of justice."* It is therefore the Petitioner's firm conviction that his case presents questions of great importance and that, under the circumstances, only this most Honorable Court can decide these questions.

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* E.G. Thompson v. City of Louisville, 362 U.S. 199; Washington v. United States, 357 U.S. 348 — cited by Stern, Robert L. and Eugene Gressman, Supreme Court Practice, Fifth Ed. (1978), p. 299.

1. The Petitioner - a lay in matters of law yet unable to find a lawyer to represent him* - brought, on his own behalf, this civil case (to be tried by jury) before the United States District Court for the Northern District of Indiana, South Bend Division, Honorable Allen Sharp, Judge. He commenced his action (File No, S79-256) by filing, on August 31, 1979, his Complaint against St. Mary's College, Notre Dame and 18 other Defendants previously named (p.vii); he did so only after he became certain that his plead-

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* The Equal Employment Opportunity Commission (hereinafter EEOC) in its NOTICE OF RIGHT TO SUE, issued to the Petitioner, August 8, 1979, notified the latter that - "if . . . /he/ cannot afford or . . . /was/ unable to obtain a lawyer to represent . . . /him/, . . . the Civil Rights Act of 1964, as amended, 42 U.S.C. /§/ 2000e-5(f)(1) permits the U.S. District Court having jurisdiction in . . . /his/ case to appoint a lawyer to represent . . . /him/"; subsequently, on August 31, 1979, the Petitioner filed his Motion For Appointment Of Counsel with the Trial Court, whose Judge, Honorable Allen Sharp, denied it on September 25, 1979. Then, on October 1, 1979, this Judge reversed himself sua sponte and officially informed the Petitioner, through his legal Clerk, Marty Kus, that the Trial Court decided to appoint counsel for the Petitioner. This Judge's decision was not carried out.

ing is "so construed as to do substantial justice";* and that "the claim/s/ . . . /are/ stated in general terms (as the Rules permit and are intended to discourage battle over mere form of statement)";** and as " the Court had emphasized that rules require the Complaint to give the Defendant/s/ 'fair notice of what the plaintiff's claim/s/ . . . are and the grounds upon which . . . /they/ rest/-/'".*** That the Petitioner's Complaint is so construed can be seen from the appended excerpts from the Petitioner's Complaint (App. Y, Z-Z/4, Z/6, pp. 73a-151a, 165a-180a) and from the presentation that follows.

2. In his Complaint (NR. 1 § 1, p. 1) the Petitioner asserted that since Fall of 1976, "his constitutional and other rights and privileges guaranteed by the United States Consti-

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* Rule 8(f), Federal Rules of Civil Procedure.

** Wright, Charles Alan, Handbook of the Law of Federal Courts (1976), p. 321 (footnote omitted).

*** Conley v. Gibson, 78 S.Ct. at 103, 355 U.S. at 48, cited by Wright, id., p. 323.

tution and other laws and legal provisions deriving from it . . . were denied, abridged, violated . . . by the Corporation of St. Mary's College, Notre Dame /IN/ (hereinafter 'St. Mary's College') and Defendants the Congregation of the Sisters of the Holy Cross (hereinafter 'the Sisters of the Holy Cross'), William A. Hickey, Donald M. Horning and Rita Mary Cassidy/; they/ engaged in numerous and various improper, unfair . . . and unlawful (concerted) conspiratorial actions (by commission and/or omission) against . . . /Petitioner/ to accomplish an unlawful purpose: deprivation and/or denial of . . . /Petitioner's/ equal rights (privileges) and opportunities, and his dismissal or forced resignation, and most recently (June 1978) forced retirement" (App. Y, pp. 74a-75a). Defendants John Duggan, Jason D. Lindower, Michael R. McKee and Sister Rose Bernard Tarleton later (after July 1975) joined this conspiratorial group (hereinafter the above named group of nine (9) Defendants will be referred to as "Administration and Faculty")

by engaging themselves also in the above described concerted actions against the Petitioner, constituting the same continuing conspiracy under 42 U.S.C. §§ 1985 and 1986 for the same described purpose (App. Y, p. 75a).

After July 1975, the Defendants Administration and Faculty were joined by another group of Defendants including two attorneys, Frederick F. Thornburg and Thomas C. Murray and the law firm of which they are a part: Thornburg, McGill, Deahl, Harman, Carey and Murray (hereinafter this law firm and these Defendants Attorneys will be referred to as "the Lawyers") to become in their turn an integral part of the above described civil conspiracy against the Petitioner by engaging themselves in similar concerted actions against the latter and for the same conspiratorial purpose (ib.).

After February 1978, the remaining group of Defendants consisting of Mary W. Shafer, Commissioner of the ICRC; J.L. Maynard, Director of the ICRC; John C. Carey, Chairperson of the ICRC; Theodore L. Sendak, Attorney

General of Indiana; Carol Ann Bowman, Deputy Attorney General; and John W. Montgomery, Judge of St. Joseph County Circuit Court, South Bend, Indiana (hereinafter referred to as "Public Officials") willfully joined the two other groups of Defendants named above in their continuing civil conspiracy under 42 U.S.C. §§ 1985 and 1986 as well as under § 1983. In doing so, they frustrated all Petitioner's efforts in seeking justice and relief in this matter (App. Y, pp. 76a-77a).

Multiple causes of action are presented in the Petitioner's Complaint (§§ 7.-12., pp. 2-3) as is an ample set of facts (§§ 13.-152., pp. 3-70), throughly documented, in support of his claim showing that the Petitioner "is entitled to relief" (Rule 8(a)(2), supra) as a victim of the Defendants' following actions:

(1) a continuing civil conspiracy under 42 U.S.C. §§ 1985 (b) and (c) and § 1986 (App. C*, pp. 185a-189a) as well as under § 1983 (id., p. 185a) including clear in-

stances of misconduct, false presentation, libel and perjury (App. Y, pp. 74a-75a);

(2) Discrimination because of the Petitioner's personal and cultural world view, including his religion (beliefs) and personal and cultural values deriving from his national origin or ancestry (id., pp. 77a-78a).

(3) retaliation because on several occasions the Petitioner made charges, filed complaints and acted as witness against St. Mary's College and some (powerful) members of its community (ib.,);

(4) breach of contract, contractual and other agreements between the Petitioner and St. Mary's College accompanied with arbitary illegal actions against the Petitioner, such as deprivation of his regular salary, denial of his sabbatical leave, denial of exemption from retirement at age 65 and not responding to his application for a new opening (ib., 79a).

In his Complaint, jurisdiction of the Trial Court is invoked under 28 U.S.C. § 1331

(App. Y, p 74a) and the constitutional provisions, statutes, ordinances, laws and regulations which - according to the Petitioner's claims - have been violated by the Defendants various unlawful actions constituting several causes of action described above (pp. 9-10) are specifically stated (id., pp. 76a-77a); however, the Petitioner asserts that - based on his case as a whole and particularly on the ample set of facts contained in his Complaint (§§ 13.-152.; see App. Z, pp. 80a-131a and App. Z/1, pp. 132a-135a) - his claim of conspiracy is the pivotal one and all other claims made by the Petitioner against all Defendants are closely interrelated and stem from the same civil conspiracy engaged in by all Defendants.

In the Conclusion of his Complaint (pp. 71-72), and, in accordance with Rule 8(a), Federal Rules of Civil Procedure, the Petitioner clearly made "a demand for judgment for the relief to which he deems himself entitled" with his "claim against . . . /each

of/ defendant/s/ . . . for a sum certain," within the meaning of Rule 55(b)(1), supra; in addition, the Petitioner's claim of total pecuniary, compensatory and punitive, damages against all Defendants is for a sum of $8,931,600.00.

By his Affidavit in support (dated August 31, 1979), attached to his Complaint, the Petitioner did "certify (under oath) that . . . the statements (in the foregoing and attached Complaint) are true and correct and the presentation of statements of facts of the claim is made . . . upon . . . (his) personal knowledge of said facts" (emphasis added).

3. On September 28, 1979, on behalf of Defendants Administration and Faculty, Vincent P. Campiti, one of their attorneys,* filed untimely a Motion To Dismiss together with a

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* Their second attorney being Arthur A. May. Contrary to the provisions of Rule 5(a), supra and Rule 5 of the Trial Court, this attorney never served his formal written appearance upon the Petitioner. Attorney Vincent P. Campiti never properly, nor timely served his formal appearance upon the Petitioner.

Memorandum in Support; stated in this Motion, the Defendants "move that . . . /the Petitioner's/ complaint be dismissed under rules 8, 10 and 12 on the ground that the complaint is basically an incomprehensible, . . . unclear, . . . pleading consisting of . . . immaterial, . . . and scandalous matter. It is in violation of the Federal Rules of Civil Procedure and beneath the dignity of this Honorable Court." (Emphasis added.)

On October 12, 1979, on behalf of Defendants Public Officials, Theodore L. Sendak, Attorney General, by Robert F. Colker, Assistant Attorney General, filed a Motion To Dismiss (together with a Memorandum) in which it was stated that they "move the Court to dismiss . . . /the Petitioner's/ action under Federal Rule of Civil procedure 12(b)(6), for the reason that the . . . /Petitioner/ has failed to state a claim upon which relief can be granted."

On October 17, 1979, the Petitioner filed timely and under Rules 54(c) and 55(a) and (b)(1), /supra/ . . . his "Demand For Judg-

ment By Default", together with a Memorandum in Support, against Defendants Administration and Faculty in which the Petitioner claimed their said Motion to Dismiss, together with a Memorandum, was filed untimely, improperly, and for fraudulent and dilatory purposes, being therefore invalid. The Petitioner requested that the Clerk of Trial Court enter a default against these Defendants or alternatively that the latter be requested to file, within 10 days, an answer to the Petitioner's Complaint in form of a properly prepared responsive pleading (App. Z/3 and Z/4, pp. 139a-151a).

On November 7, 1979, on behalf of Defendants Lawyers, attorney R. Kent Rowe filed untimely a Motion to Dismiss (together with a Memorandum in Support) in which it was stated that these Defendants "move that . . . /the Petitioner's/ claim for relief be stricken and dismissed as to these moving Defendants in accordance with Rules 8 and 12(f), /supra/ . . . because said pleading is

replete with scurrilous, offensive and objectionable allegations and should not be permitted to remain of record; the form of claim for relief fails to comply with Rule 8 requiring that a pleading be 'simple, concise and direct'; said pleading is . . . unintelligible; and much /sic/ of it is immaterial . . . and in gross violation of the letter and spirit of Rule 8." (Emphasis added.)

On November 13, 1979, the Petitioner filed his "Response To The Attorney General's Motion To Dismiss" (the latter having been filed on behalf of the Defendants Public Officials) pursuant to Rule 7(b) of the Trial Court. In this pleading (NR. 8, p. 4), the Petitioner claimed that these "Defendants - by filing said Motion to Dismiss in . . . /said/ Court . . . - did not act in a way consistent with 'expeditious and effective administration of justice'; /and that/ they discharged neither administrative professional responsibilities, nor duties toward the /Petitioner/, a citizen of the United States." As stated above (p. 11), contrary to these

Defendants' allegations in their Motion to Dismiss, the Petitioner claimed that there are abundant facts in the Petitioner's Complaint (NR. 1, §§ 100-152, pp. 40-70; see also NR. 8, pp. 7-8; and App. Z, pp. 116a-131a) showing clearly, since March 1, 1978, Defendants Public Officials willfully participating (together with the Defendants Lawyers and Administration and Faculty) in continuing civil conspiracy (a) under 42 U.S.C. §§ 1985 (b)(c) and 1986 (App. C*, pp. 185a-189a) as well as (b) under § 1983, supra,(id.). These facts indeed amply show - without even considering the question of eventual liability of the Public Officials under § 1983 - Defendants (private persons) jointly engaged with Defendants Public /State/ Officials in various prohibited actions against Petitioner; they acted "under color of . . . /law and/ subject/ed/, or cause/d/ to be subjected . . . /the Petitioner/ to the deprivation of . . . rights, /and/ privileges . . . secured by the Constitution and laws" of the United States (App. C*, p. 185a); among others,

those secured by its Amendments I, V, VII, and XIV (App. A*, pp. 181a-182a).

These prohibited actions were made "under color" of Indiana Civil Rights Law -- IC 1971, 22-9-1 (App. E*, pp. 191a-192a) and Administrative Adjudication Act /of Indiana/ -- IC 1971, 4-22-1 (App. H*, pp. 206a-217a). In this pleading, the Petitioner prayed the Trial Court that these Defendants' "said dilatory claim without merits contained in said . . . 'Motion to Dismiss' and 'Memorandum' be rejected and their 'Motion to Dismiss' denied . . ." or alternatively, that said Defendants be required to file, within 10 days, their answer to the Petitioner's Complaint in form of a properly prepared pleading (NR. 8, pp. 8-9).

On November 20, 1979, the Petitioner filed his "Notice About Defendants' Contempt For The Federal Rules And Of Petitioner's Objections To Defendants' Motion To Dismiss" (NR. 9), namely against Defendants Lawyers; the Petitioner claimed Defendants Lawyers showed

"contemptuous disregard of the Federal Rules /illustrative of which is a provision in Rule 1 that the rules of procedure 'be construed to secure the just, speedy and inexpensive determination of every action'/ (emphasis added) and of the Rules of the . . . /Trial/ Court, their extreme arrogance towards . . . /said/ Court, a complete disdain for the . . ./Petitioner/ and their lack of respect for truth and justice . . ." (NR. 9, p. 1). The Petitioner pointed out that Lawyers "move/d/ the Court for an extension of time within which to file a responsive pleading to . . . /Petitioner's/ claim for relief . . . to and including the 30th day of October, 1979 . . . ." (emphasis added). Yet, without expressing any excuse or reason, they left the time to expire without filing their responsive pleading! Instead of the responsive pleading, they filed untimely, - 8 days after said extended deadline - their invalid "Motion to Dismiss." The Petitioner claimed that the latter is invalid for the following reasons: it was not filed timely; not served

properly to the Petitioner and it represents a dilatory plea, consisting of fraudulent and offensive matter which does not go to merits (NR. 9, p. 3).* Therefore, the Petitioner prayed that the Trial Court declare said "Motion To Dismiss" null and order these Defendants to file their responsive pleading within 10 days (id., pp. 6-7).

4. In the three months following the filing (August 31, 1979) of the Petitioner's Complaint, no proper step had been taken either by the Trial Court or by the Defendants; no ruling had been made either upon the Defendants' aforementioned "Motions to Dismiss" or upon the Petitioner's three aforesaid pleadings - succeeding his Complaint - even though each of the Petitioner's pleadings contained "two or more statements of a claim /requests/ made in the alternative" (Rule 8(a), supra). None of the Defendants

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* These reasons are similar to those for which the Petitioner claimed (on pp. 13-14) that the aforesaid "Motion to Dismiss" filed by Defendants Administration and Faculty was invalid.

ever filed a responsive pleading despite Rule 12(a), supra, which in its relevant part provides: ". . . The service of a motion permitted under this rule /including Motions to Dismiss/ alters this period /in the aforesaid Defendants' matter, 20 days/ to time as follows, unless a different time is fixed by order of the court: (1) if the court . . . postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the notice of the court's action." (Emphasis added.) Accordingly, the Petitioner concluded that - by its nonruling upon the Defendants' said "Motions to Dismiss" and by its Order of December 3, 1979 (App. S, p. 65a) - the Trial Court indeed, de facto, "postpone/d/ its disposition /of these "Motions"/ until the trial* on the merits." (Rule 12(a), supra.)

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* In the sense of "/a/ judicial examination and determination of issues between parties to actions . . . (citation omitted)" (Black's Law Dictionary (1979 ed.), p. 1348) - in the present case - by the judge, sua sponte without trial by jury even though the petitioner demanded a trial by jury.

It should be pointed out here that not only has the Trial Court failed to rule upon Petitioner's requests in all three above described pleadings, particularly when it failed to enter default and judgment "By the Clerk" as sought by the Petitioner under Rule 55(a)(b)(1) - but its clerk himself (A. Pope) refused to comply with Federal Rules of Civil Procedure. He made the following serious error, prejudicial toward the /Petitioner/, in form of a statement made in the folio of the docket of the above entitled cause: "Clerk's judgment (by default) not entered because responsive pleading /by Defendants/ already on file (per A. Pope)" even though no responsive pleading is on file in the instant case. This Clerk, as well as the Trial Court, continously refused to correct this serious error despite the Petitioner's persistent requests made in several of his pleadings filed with said District Court. (See: App. Z/5, pp. 161a-163a.)

5. On December 3, 1979, "/t/he within case /of the Petitioner's suit/ . . . /was/ submit-

ted to the Honorable G.B. Lee, United States Magistrate, for all necessary pretrial procedure . . . . within authority of his office." (App. S, p. 65a.)

On January 15, 1980, because 43 days had elapsed after the Trial Court's foregoing order with no action whatsoever in the instant case, the Petitioner filed his "Motion for Pretrial Conference" pursuant to the Federal Rules of Civil Procedure 1 and 16 and Local Rules 7 and 12. The Court failed to rule upon this Motion.

On January 21, 1980, after having received "Notice" (App. T, pp. 66a-67a) from the Trial Court Clerks's Office regarding the Petitioners "right to consent to have . . . /said/ Magistrate conduct any or all proceedings in a jury or nonjury civil matter, and order the entry of judgment . . .," the Petitioner declared himself "unwilling to consent," signed his "REFUSAL TO CONSENT" and filed it with the Court. (App. U, p. 68a.)

Furthermore, since during the more than

90 days that elapsed following the aforesaid Order by the Trial Court, the aforesaid Magistrate took no proper step in compliance with said Order, and because said Magistrate explicitly refused to rule upon the Petitioner's above mentioned "Motion For a Pre-trial Conference", the Petitioner filed, on March 17, 1980, his "Request For Placing Of . . . The Petitioner's Action Upon The Trial Calendar" (NR. 10-12) pursuant to Federal Rules of Civil Procedure 40 and 16, and Rule 12 of the Trial Court. The Trial Court failed to rule upon this Motion.

On April 23, 1980, the Petitioner filed his Application for Writ with the Seventh Circuit Court of Appeals (Cause No. 80-1541) under 28 U.S.C. § 1651(a) and Rule 21(c) of Federal Rules of Appellate Procedure requesting said Court of Appeals to issue an extraordinary writ requiring that the Trial Court (Honorable Allen Sharp, Judge) "promptly do what should be done in accordance with the Federal Rules of Civil Procedure, laws and

Constitution of the United States" (NR. 13, p. 4).

On May 3, 1980, Robert F. Colker, attorney for Defendants Public Officials filed with said Court of Appeals "Response to Application For Writ" and "move/d/ the Court to Deny and Dismiss the /Petitioner's/ Application for Writ . . . /stating/ that . . . /the entire instant/ action should be dismissed and all costs be assessed against the . . . /Petitioner/ and . . . /that he/ be ordered to pay the fees of defendants' attorney and all other expenses occasioned by this action." Yet, this "Response", prepared and filed by said Assistant Attorney General of Indiana, is <u>in direct violation</u> of Rule 21, <u>supra</u>, to which he referred, particularly Rule 21(b) which deals with Order Directing Answer" and provides that, "the answer to the petition /application/ be filed by the respondents and all other parties /only/ in the time fixed by the /Circuit Court's/ Order." There was no such

Order. In addition, said "Response" was written in language offensive to the Petitioner using words which are defamatory per se. Despite that, this Court of Appeals considered this "Response" as a bona fide pleading.

On August 5, 1980 - eight months after the Trial Court's Order involving the aforesaid Magistrate in the present case entered (App. S, p. 65a) and only once several inquiries were made by members of the Appellate Court's legal staff - the Petitioner received "Notice of Hearing" (App. V, p. 69a) from said Magistrate calling "/t/he hearings on defendants' separate and several Motions to Dismiss (ib.) . . . fixed on August 19, 1980."

On August 12, 1980, the Petitioner filed timely his "Objections to Magistrate's Calling Of The Hearings on Defendants' Separate and Several Motions to Dismiss", together with a "Brief Of Objections To Magistrate's Calling Of Hearings . . ." and Affidavit in support (NR. 14-16). The Petitioner took

this action pursuant to the Federal Rules of Civil Procedure, Rule 1 in particular; Federal Magistrates Act, 28 U.S.C., in particular § 636(b) (App. F*, pp. 198a-199a; and Rules M-2(a)(b), M-3(a) and M-4 of the Magistrates Rules of said District (App. G*, pp. 203a-204a); in accordance with these Rules, the Petitioner respectfully requested "that the Honorable Allen Sharp, Judge of the United States District Court, set aside the call of said hearings under the aforementioned Rules for the reasons that (1) it is not in compliance with said Rules; (2) there are no valid 'Defendants' Motions to Dismiss' filed with this Court of the above entitled cause which could be properly considered during said hearings; (3) /even if there were/ such pending valid 'Defendants' separate and several Motions to Dismiss' . . . properly filed, said United States Magistrate could not conduct any such hearings on such /dispositive/ Motions to Dismiss without the consent of all parties under the Federal Magistrates Act of 1979;

(App. F*, pp. 198a-202a; see also, App. G*, pp. 203a-205a);* the Petitioner filed his Refusal to Consent timely (January 21, 1980), and therefore (4) said hearings would not serve 'the best interest of justice'." (Emphasis added.) (NR. 14, p. 1) The Trial Court failed to rule upon the Petitioner's said pleading.

On August 19, 1980 - despite the Petitioner's said written "Objections To Magistrate's Calling of the 'Hearings . . .'" - said Magistrate held these "hearings" on this date and proceeded, as he put it, "in conformity with § 636(c) /sic/ of said act /i.e. the Federal Magistrates Act of 1979/" without objection by the Trial Court. Said Magistrate (together with the Trial Court) was aware that, as stated above, the Petitioner signed and filed (January 22, 1980) his "Refusal to Consent", and that - according to § 636(c) -

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* The cover sheet of the docket belonging to the instant case bears the following indication: "Dispositive Consent Refused"; this statement was added after the Petitioner's filing of said "Refusal to Consent."

it is only "(1) Upon the consent of the parties /that/ a . . . magistrate . . . may conduct any or all proceedings in a jury or non-jury civil matter and order . . . when specially designed to exercise such jurisdiction by district court . . ." (App. F*. pp. 199a-200a; App. G*, pp. 204a-205a). (Emphasis added.) The magistrate conducted and terminated these hearings improperly and without jurisdiction (See App. 2/5, pp. 153a-162a).

In an attempt to speed up the Court of Appeals' ruling upon the above said Application for Writ (described on pp. 23-24), the Petitioner filed his "Petition For Prompt Determination of Petitioner's Application for Writ" (NR. 17) with the Seventh Circuit Court of Appeals; this was followed by the filing of two similar pleadings, at the interval of a month, for the same purpose (NR. 18-19). Nevertheless, on December 16, 1980, the Court of Appeals entered its ruling as follows: "It is ORDERED that the Petition for writ of mandamus, is DENIED.

Petitioner has not sustained the burden of making out a case for this extraordinary relief."* Following this Court's denial, the Petitioner filed with this same Court of Appeals: (1) "Motion For Modifying (Reversing) the Court's Denial (Order) of December 16, 1981; and (2) Motion For Examination of the Petitioner's Cause By The Court In Banc," the latter of which was denied by said Court on February 3, 1981, the former unacknowledged.

On January 27, 1981, the aforesaid Magistrate filed his "Report of United States Magistrate In Response To Order Dated December 3, 1979" (App. W, pp. 70a-71a). In the introduction of this Report, this Magistrate implies that the latter was made following the Trial Court's Order entered December 3, 1979 "referring this case /sic/ to . . . Magistrate** for all necessary pretrial procedures

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*It is pertinent to point out that the Petitioner never filed "a petition for a writ of mandamus" as the Court alleged in this ruling (See on p. 24).

** It is pertinent to point out that it was not "this case," but "/t/he within case . . . which was submitted" to said Magistrate. (App. S, p. 65a).

and the formulation of a full and complete pretrial order pursuant to § 636(b) of the Federal Magistrates Act of 1968, as amended, and this report is submitted and filed with the court in conformity with § 636(c) of said act (emphasis added)." (App. W, p. 70a)

On January 30, 1981, the Trial Court entered its Order (App. X, p. 72a) stating that the Petitioner "is now given until February 17, 1981 to file full written objections" to the foregoing Magistrate's Report.

On February 4, 1981, the Petitioner filed his "Objections" (NR. 25) to the Magistrate's Report. In this pleading, addressed to Honorable Allen Sharp, Judge of the Trial Court, the Petitioner set forth his claim showing that the Magistrate's Report was prepared in clear violation of law; it was "the result of unauthorized, illegally called, and improperly conducted 'hearings'" (NR. 25, p. 1; see App. Z/5, pp. 153a-164a). In it, the Petitioner prayed: "1. That the Trial Court declare aforesaid . . . 'Report' invalid for

the reasons indicated above; and 2. That the Court exercise its jurisdiction in the Petitioner's case and provide him due process of law consistent with his prior pleadings" (NR. 25, p.5). The Trial Court failed to rule upon this pleading.

On March 2, 1981, the Petitioner filed with the Trial Court his "Motion For Expeditious Exercise Of This Court's Jurisdiction" in which he restated the same requests as those made in the foregoing pleading (i.e. "Objections . . .") and the following additional ones: - "That the /Trial/ Court accord to the /Petitioner/ 'full right to be heard according to law' (Code of Judicial Conduct, Canon 3(A)(4) and that his 'right of trial by jury . . . be preserved . . .' as provided by the Seventh Amendment to the Constitution of the United States. - That the Court correct its prejudicial error (against the Petitioner in the instant case)" (NR. 27, p. 5). Instead of taking heed of his adjudicative responsibilities and "dispos/ing/ promptly of the business of the court" in

the instant case (Code of Judicial Conduct, Canon 3(A)(5), the aforesaid Trial Court's Judge once more ignored the Petitioner's pleadings; he failed to rule upon this Motion.

On March 3, 1981, the Trial Court entered its Order together with Memorandum and Order, in a joint document (App. F, pp. 29a-35a), "confirm/ed and adopt/ed/ the Magistrate's conclusions as those of the Court" (id., p. 34a); /a/ccordingly, it . . . /was/ ordered that the . . . /Petitioner's/ motion for entry of default and default judgment* be DENIED; and /all three of the Defendants' above described/ (pp. 13-14) motions to dismiss be GRANTED, except with regard to the . . . /Petitioner's/ claim based on Title VII . . . and the . . . breach of contract claim . . . /and/ that . . . /he/ file an amended complaint limited to those claims in confor-

* As stated above (p. 14) in his Pleading (Z/3, p. 141a) the Petitioner requested only that "the clerk of this Court enter a default against /a group of/ Defendants, /i.e./ Administration and Faculty . . .."

mity with Rule 8 /sic/ . . ."

On April 8, 1981, the Petitioner filed his "Motion for Relief from Judgment" (NR. 31) pursuant to Rules 60(b)(3)(4) and (6) and requested that the Trial Court grant him relief from judgment contained in its Order of March 3, 1981 by setting aside the latter (id., p. 1) for the reasons thoroughly presented in said motion.

On April 14, 1981, the Trial Court denied the Petitioner's said "Motion for Relief from Judgment" without giving any reason for this denial (App. E, p. 28a).

On September 4, 1981, the Petitioner filed "Motion for Determination of . . . /his/ Entire Case . . ." (NR. 39); in it he moved that the Trial Court "examine the whole record of the above entitled cause and make determination of the /Petitioner's/ entire case, correct errors and overrule all the Court's decisions-denials-orders stated in its Order of March 3, and April 14, 1981 (see App, F, pp. 34a-35a and App.E, p. 28a) and

. . . provide . . . /the Petitioner/ with all proper relief requested since /commencing his instant action/ August 31, 1979 . . . . (NR. 31, p. 1)"; he claimed that the Trial Court's decisions-denials and orders, stated above, in particular the Court's order that the Petitioner amend his Complaint, are all "erroneous and present serious hardship" (id., pp. 1-2) to the latter. Furthermore, in said Motion, the Petitioner declared: "For the purpose of clarity, . . . /he/ considers it relevant to state here as follows: As . . . in several of his pleadings (filed since August 31, 1979, . . . that he does not intend to amend his Complaint, or to 'file an amended complaint* limited to claims . . . /of the Petitioner's/ . . .' as ordered by the Court's aforesaid Order entered March 3, 1981 (App. F, pp. 34a-35a); such an amendment would strike a vital blow to the . . . /Petitioner's/ whole action of which all claims

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* The Petitioner so informed the Trial Court as early as October 1, 1979 through its legal Clerk, Marty Kus (see above p. 5).

are closely interrelated and stem from the same civil conspiracy engaged in by all Defendants against the . . . /Petitioner/ . . ." (see above, p.11); the latter's said decision was supported by the accepted principle: "The law does not permit or require the doing of an act which will result only in loss." (See Black's Law Dictionary (1979 ed.), p.951) It is pertinent to also state here that those claims to which the Petitioner's amended Complaint would be limited, according to the Trial Court's said Order (of March 3, 1981) are already amply presented in the Petitioner's Complaint.

On November 24, 1981, the Trial Court entered its Order (App. D, p.26a) denying the Petitioner's aforesaid "Motion for Determination of the . . . /Petitioner's/ Entire Case . . ."; this Motion was denied not after considering the Petitioner's "entire case", as the latter requested, but only, as said Court stated, "/upon careful review of the /Petitioner's aforesaid/ motion and memorandum, /for which/ . . . this Court finds insuffi-

cient grounds therein to reverse this Court's prior ruling (emphasis added)." (App. D, p. 26a) It seems pertinent to point out that the Petitioner's said Motion was denied with no follow up - at that time, or ever - notifying the Petitioner that, "if he fails so to do /i.e. to amend his Complaint according to said Court's Order of March 3, 1981/, the /Petitioner's/ action shall stand dismissed with prejudice as to that day". (Webst's Federal Forms (1877), § 2510)*

On November 25, 1981, Vincent Campiti, attorney representing Defendants Administration and Faculty, filed with the Trial Court "Motion For Judgment On The Pleadings For Failure To State A Claim Upon Which Relief Can Be Granted" /NR. 44); in it these Defendants "pursuant to Rule 12(c) and(h) F.R.C.P. . . . request the court to enter Judgment on the Pleadings for the moving defendants on the ground that . . . /the Petitioner/ has failed

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* Furthermore, there were several instances in the instant case in which the Trial Court, Honorable Allen Sharp, Judge, did not carry out its decision (see above footnote, p.5) nor follow up on its Order (App. X, p.72a; see above, pp.32-34)

to state a claim upon which relief can be granted . . .." These Defendants were aware that - at that state of pleadings in the instant case - Rule 12(c) and (h), supra could not serve as proper legal grounds for filing the Defendants' Motion; and that they could not properly submit a defense of failure to state a claim upon which relief can be granted by motion for judgment on the pleadings. Rule 12(c), supra, provides in its relevant part:

> "After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings.. . ." (Emphasis added.)

The instant case was not closed at that time.*

On December 4, 1981, the Petitioner filed his "Motion For Reversal Or Amendment of the /Trial/ Court's Order of November 14, 1981," together with a Memorandum in Support and an Affidavit /NR. 45/; the Petitioner submitted this Motion under Rules 4 38(a,b), 39(a), 40,

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*For more detail regarding these Defendants' said filings, see App. 2/6, pp.166a-168a, 177a -180a.

50(a,b), 52(b,c), 54(b,c), 55(a,b,d), supra; 28 U.S.C. § 1292 and under the Fifth and Seventh Amendments to the Constitution of the United States /id., p.2/. In this Motion, the Petitioner prayed: "(1) That the /Trial/ Court reverse or amend its prior ruling contained in its Order of November 24, 1981 /App. D., pp.26a -27a/ after examining the . . . /Petitioner's/ entire case . . .; (2) That - if . . . /the Trial/ Court decides to make an Order of denial of the . . . /Petitioner's/ 'Motion For Reversal . . .' - the /Trial/ Court state in such Order that the latter is

> 'of the opinion that such order /of denial/ involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation . . ..'

as prescribed by 28 U.S.C. § 1292(b) /NR. 45, pp.3-4/."

The Trial Court refused to rule on this Motion and to consider any of the alternative requests made by the Petitioner.

On December 7, 1981, the Trial Court entered its final Judgment as follows:

> "This action came on for (hearing) before the Court, Honorable Allen Sharp, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered,
> It is Ordered and Adjudged that . . . /the Petitioner/ take nothing by his complaint and this case is dismissed."
> /App. C, pp.53a-54a/

It is pertinent to state here that - contrary to the Trial Court's allegations in its aforesaid Judgment - the Petitioner's case was dismissed without "this action . . . (coming) on for (hearing) before the Court /during which/ Honorable Allen Sharp, United States District Judge /would be/ presiding and /during which/ the issues /would/ have been duly (heard) . . . /and, therefore the Trial Court's said/ decision by which (this case is dismissed) . . . /has not/ been duly rendered . . .."

Besides, in its Order, entered also December 7, 1981, the Trial Court declared that, "in light of . . . /the Petitioner's/ failure to amend (complaint), the Court hereby enters a final order of /its/ dismissal." /App. C, pp.24a-25a/

It is equally pertinent to point out that the Trial Court entered its aforesaid Order of

Dismissal and Judgment following the Defendants' aforesaid "Motion On The Pleadings For Failure To State A Claim Upon Which Relief Can Be Granted" (filed November 25, 1981); and that by entering said Order, the Trial Court "grant/ed/ Judgment on the Pleadings to the moving defendant/s/" as the latter prayed the Trial Court in their "Motion For Judgment On The Pleadings . . ."; the Trial Court ruled so even though the Defendants' said "Motion" represents an unlawful filing which is neither in compliance with the Federal Rules of Civil Procedure, nor with the Rules of said District Court /see App. Z/6, pp.166a-168a, 177a-180a/

On December 31, 1981, the Petitioner filed his "Motion For Relief From Judgment and Order, Both Dated December 7, 1981" together with Brief in Support and an Affidavit pursuant to Rules 60(b)(3), 60(b)(4) and 60(b)(6), as well as Rule 1, of the Federal Rules of Civil Procedure (See App. Z/6, pp.165a-180a).

On January 6, 1982 - despite the fact that the Petitioner filed aforesaid "Motion For Relief From Judgment And Order . . ." /App. Z/6/ timely and properly in accordance with "General Rules of Pleading" contained in Rule 8(a), supra - the Trial Court simply declared in its final Order that,

> "This Court having carefully considered the record in this case, now DENIES said Motion. SO ORDERED /App. B, pp.22a-23a/ . . .

without giving any reason for its denial.

REASONS FOR GRANTING THE PETITION

First of all the Court of Appeals indeed "has so far departed from the accepted and usual course in judicial proceedings . . . /as well as/ so far sanctioned such a departure by . . . /the/ lower court that, as to call from exercise of this /Supreme/ Court's power of supervision."* The Court of Appeals did so in sanctioning the Trial Court's decisions (especially those contained in its Orders entered

*Rule 17(a), Rules of the Supreme Court of the United States.

March 3, 1981 (App. F, pp.34a-35a) and December 7, 1981 (App. G, pp. 24a-25a)), and above all in affirming the dismissal of this case (App. A, pp.1a-2a, 20a-21a) and in so doing, rendering its decisions "in conflict with applicable decisions of this /Most Honorable/ Court,"* notably Conley v. Gibson, 355 U.S. 41, at 45-48 (1957).

Furthermore, the Trial Court's and the Court of Appeals' proceedings and the decisions of both in sum - having resulted in the deprivation of the Petitioners's constitutional rights including those of freedom of exercise of religion, freedom of speech, the right to petition Government for a redress of grievances, right to property without due process of law, right of equal protection of laws, and especially "right to jury determination,"** represent "a gross miscarriage of justice." ***

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*Rule 17(c), supra.

**Rogers v. Missouri Pacific R. Co., 352 U.S. 500, 510 - cited by Stern, Robert L. and Eugene Gressman, Supreme Court Practice (1978), p.293.

***Thompson v. City of Louisville, 362 U.S. 199; Washington v. United States, 357 U.S. 348 - cited by id., p.299.

Indeed the record shows that the management of the judicial administration in the instant case was performed by the Courts below not in a way as to seek truth and justice in accordance with the provisions of Federal Rules of Civil Procedure "to secure the just, speedy and inexpensive determination of . . . /the Petitioner's/ action," within the meaning of Rule 1 of the latter, but to the contrary, the Trial Court's action and the Court of Appeals' action and sanction constituted involvement in systematic distortion of the truth and obstruction of justice.

In addition, there is a substantially large amount of money involved ($8,931,600) as the Petitioner's claim of total pecuniary, compensatory and punitive, damages against all Defendants.

I. A. and B.

Conflict with applicable decisions of the Supreme Court of the United States.

In Conley v. Gibson, 355 U.S. 41, at 45-48 (1957), the Court held that

> In appraising the sufficiency of the complaint we follow of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief.. . ..
> . . . .
> /T/he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is "a short and plain statement of the claim* that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.. . .. The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of the pleading is to facilitate a proper decision on the merits. Cf. Maty v. Grasselli Chemical Co., 303 U.S. 197." (emphasis added.)

The sufficiency of the Petitioner's Complaint is clearly shown by the Statement of the Case and several extended excerpts from it or the Petitioner's other pleadings (see Appendices Y, Z, Z/1, Z/2, pp. 73a-138a). Both courts below recognize explicitly that in his complaint, the Petitioner did definitely prove a "set of facts in support of his claim which

*Rule 8(a)(2)

would entitle him to relief . . . /and that he did/ give the defendant/s/ fair notice of what . . . /his/ claim/s/ . . . /are/ and the grounds upon which . . . /they/ (rest)." Conley v. Gibson, supra; the Court of Appeals recognized it by declaring:

> The district court . . . held that the plaintiff had fulfilled the requirements for filing suit under Title VII. Broadly construed, the complaint successfully pleaded a claim under Title VII, 42 U.S. §§ 2000e-2 and -3 and also successfully pleaded a pendant state claim for breach of contract (emphasis added). (See. App. A, p.17a, and App. F, p.34a)

Therefore, both Courts below, based on their recognition that the Petitioner's "Complaint successfully pleaded . . . claim/s/" and this Court's decision in Conley v. Gibson alone, must have been aware - because of this conflict - that the latter could not be dismissed and that the Trial Court's decision to dismiss the Petitioner's Complaint represents an abuse of discretion and disregard for law, and the Court of Appeals' affirmation of the Trial Court's said decision "so far departed from the accepted and usual course of judicial proceedings . . . /and/ so far sanctioned such departure

by . . . /said/ lower court, as to call for an exercise of this Court's power of supervision." (Rule 17(a), supra.) This abuse of discretion and disregard for law by both Courts below is further manifest when one considers the fact that this Court restated its previous decisions more recently, in Haines v. Kerner, 404 U.S. 519, at 520-521 (1972) in which it held that

> "The District Court erred in dismissing . . . (Petitioner's) pro se complaint without allowing him to present evidence on his claims.
> . . . /A/llegations such as those asserted by petitioner, however inartfully pleaded, are sufficient to call for opportunity to offer supporting evidence.. . ..
> . . . /W/e conclude that he is entitled to an opportunity to offer proof. . . .."

Gross misapprehension of the facts.

What follows will show that the Court of Appeals grossly misapprehended the facts relevent to the issues presented for review, based its decisions on such misapprehension of the facts and failed to adhere to proper procedure particularly in reaching its decision of March 1, 1983,

> "that the judgment of the said District Court in this cause . . . is hereby,

AFFIRMED, with costs, in accordance with the opinion of this Court entered this date /App. L, pp.47a-48a/."

What is presented in the Statement of the Case and that which follows below clearly show that this Court of Appeals' said opinion consists mostly of manifestly erroneous allegations contrary to the facts and inconsistent with themselves and the Court's other allegations.

The Court of Appeals' opinion contains the following allegations:

> "After a preliminary examination of the briefs, the court notified the parties that it had tentavively concluded that oral argument would not be helpful to the court in this case.. . .. /See App. A, footnote, pp. 1a-2a)
>
> . . . .
>
> Plaintiff applied for a writ of mandamus in an attempt to speed up the trial court's determination of this case in appeal No. 80-1541. That application was denied in an order dated December 16, 1980.. . .. /id., pp. 5a-6a/
>
> . . . .
>
> A. Validity of Defendant's Motions to Dismiss
>
> Plaintiff claims that he was entitled to a default judgment against all of the defendants for failing to file an answer within twenty days. Plaintiff filed a motion for default judgment on October 17, 1979 after the defendants had filed Rule 12 motions to dismiss on September 28, 1979 and on October 12, 1979. The judge refused to grant a default judgment because the entry of a default would heve

been a mere formality due to the existence of good cause to set it aside. The good cause to set a default aside was the fact that Ostric's complaint failed to state a claim upon which relief could be granted except as to a few claims; therefore the plaintiff was not entitled to judgment. In addition, the judge refused to grant a default judgment because the defendants had already filed their motions to dismiss when plaintiff asked the court to enter a default.

. . . .

B. Submission of the Case to a Magistrate

Plaintiff contends that the district court erred in referring the case to a United States Magistrate without his consent. The district court properly followed the procedure provided in 28 U.S.C. § 636(b)(1)(B).. . . /See App. A, pp. 7a-8a/.

. . . .

C. Dismissal of the Complaint with Leave to File an Amended Complaint

. . . .

(1) Immunity of the State Defendants

The district court did not err when it dismissed Ostric's suit against the Indiana defendants because they were absolutely immune from suit. (id., pp. 9a-10a/

. . . .

(3) Dismissal of the § 1983 Claim

To state a claim under Section 1983, a plaintiff must allege that a constitutional right was violated under color of state law. Adickes v. S.H. Kress & Co., 398 U.S. 144, 150 (1970). The district court dismissed Ostric's claim under Section 1983 for failing to demonstrate or allege sufficient state participation in the alleged conspiracy to deprive him of his rights.. . ..

Although Ostric alleges the existence of a conspiracy, his pleadings

fail to support that allegation. . . . The plaintiff failed to allege sufficient facts from which the district court could infer state participation in a conspiracy. /App. A, pp. 11a-13a/

. . . .

The district court properly held that the plaintiff failed to state a claim under Section 1983 because the remaining defendants, St. Mary's College, the Congregation of the Holy Cross, the named faculty members and other college personnel and the law firm and lawyers representing the college were not acting under color of state law.

(4) Dismissal of the § 1985 Claim

An action under Section 1985 does not require that a defendant act under color of state law; therefore, conspiracies by private parties are actionable under Section 1985. Griffin v. Breckenridge, 403 U.S. 88 (1971).. . . .

St. Mary's is not a state institution nor did any of the alleged conspirators attempt to deprive Ostric of his right of recourse to any state agency or court.. . . .

(5) Dismissal of §§ 1986 and 1988 Claims

To state a claim under Section 1986, a claim must be established under Section 1985. William v. St. Joseph Hospital, supra. Ostric failed to state a claim under Section 1985, therefore his section 1986 claim must fail for the same reasons. Therefore, the district court properly dismissed plaintiff's claim under Section 1986 . . . for failure to state a claim upon which relief could be granted.

. . . .

(7) Dismissal of Complaint with Leave to File an Amended Complaint

Pro se plaintiff Anthony Ostric filed a 74 page . . . complaint, which . . .

contains irrelevant comments and claims, and is so confusing that responsive pleading would be impossible. The defendants filed a motion to dismiss on that basis.. . .. We cannot conclude that the district court erred in ordering the plaintiff to amend his complaint to comply with Federal Rules of Civil Procedure 8.

D. Dismissal of the Case for Failure to Amend

The question of whether to dismiss a complaint for failure to amend rests within the sound discretion of the district court. The district court will not be reversed absent a showing of abuse of discretion. See Carl Locasio v. Teletype Corporation, No 82-1354, slip op. (7th Cir. Dec. 2, 1982), Beshear v. Weinzapfel, 474 F.2d 127 (7th Cir. 1973).. . .. Nine months after the court ordered the plaintiff to amend the complaint, the district court granted the defendants' motion to dismiss for failure to amend the complaint. We cannot conclude that the district abused its discretion in dismissing the plaintiff's case. Pavilonis v. King 626 F.2d 1075 (1st Cir. 1980).

III

For the above reasons the district court order dismissing plaintiff's case for failure to amend is affirmed. (Emphasis added.)

The above quoted allegations taken from the Court of Appeals' aforesaid opinion (See App. A, pp. 1a-21a) are erroneous and contrary to the facts contained above in the Statement of

the Case, aside from the Court's initially cited allegations in its footnote (See App. A, pp. 1a-2a) regarding oral argument. This allegation is also false because the fact remains that the Court has never "notified the parties that /it was/ tentatively concluded that oral argument would not be helpful to the court in this case." The Court's Notice, dated March 31, 1982 (See App. R, pp. 63a-64a) does not contain any such conclusion by the Court.

As for the Court's allegation regarding "writ of mandamus" (See App. A, footnote, pp. 5a-6a), the truth is that the Petitioner did not apply for such an extraordinary writ under Rule 21(a), Federal Rules of Appellate Procedure, but for a writ under Rule 21(c), supra, as presented above (pp. 23a-25a).

The Court's above cited allegations under the title: "A. Validity of Defendant's /sic/ Motions to Dismiss," contain nothing about the "validity" of the latter. What is written under this title indeed mispresents the facts which are very relevant to the issues present-

ed for review. As shown above, (pp.13-14), contrary to what the Court's allegations imply, the Petitioner did not file his "Demand For Judgment By Default" against all the Defendants, but only against Defendants Administration and Faculty. These Defendants' Motions to Dismiss as well as the second group of Defendants, Lawyers, alleged the Petitioner's Complaint to be "incomprehensible" or "unintelligible" and accordingly they, these Defendants, could move only to dismiss the latter "under Rule 8" and they did so even though they knew that their allegations were false and their Motions to Dismiss invalid; the reason these Motions to Dismiss were invalid is specifically presented above (pp. 14-21 and by App. Z/3 and Z/4, pp. 139a-151a). Based upon all this, or merely upon that which is directly preceding, (pp. 43-46), or even only upon the Court of Appeals' recognition that "the /Petitioner's/ Complaint successfully pleaded . . . /two claim/s/ . . ." (See above, p. 45; see also App. A, p. 17a), one

is compelled to recognize the Court of Appeals' allegations under A. (and C.(7) as well) as completely false and inconsistent with other allegations made in the same Court's opinion. Therefore, the Court of Appeals erred and contradicts itself in alleging under A. that

> "The /Trial Court's/ judge refused to grant a default judgment because the entry of a default would have been a mere formality due to the existence of good cause to set it aside. The good cause to set a default aside was the fact that Ostric's complaint failed to state a claim upon which relief could be granted except as to a few /sic/ claims. In addition, the Judge refused to grant a default judgment because the defendants had already filed their motions to dismiss when plaintiff asked the court to enter a default. /App. A, pp. 7a-8a/
> . . . .
> (7) . . .
> . . . Anthony Ostric filed a 74 page . . . complaint,* which is so confusing that responsive pleading would be impossible. The defendant filed a motion to dismiss on that basis (under Rule 8, /and not under Rule 12 as the Court alleged before/).. . .. We cannot conclude that the district court erred in ordering the plaintiff to amend his

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* The truth is that the Petitioner's Complaint amounted to 71 and a half pages in all.

Complaint to comply with Federal Rules of Civil Procedure." (App. A, pp. 18a-19a)

Furthermore, it should be pointed out that this last, just quoted, allegation (under A.) regarding the second reason why "the judge refused to grant a default judgment" represents additional evidence of the Court of Appeals' distortion of the truth. As asserted above (pp. 13-14) the Petitioner, under Rules 54(c) and 55(a) and (b)(1), supra, requested that the Clerk of the Trial Court enter a default (see also App. Z/3 and Z/4, pp. 139a-151a) and, as stated above (p. 21), the Clerk refused to comply with Rule 55(a) and (b)(1); as the reason for his refusal to enter said default it was specifically stated on the folio of the docket: "Clerk's judgment (by default) not entered because responsive pleading /by Defendants Administration and Faculty/ already on file" even though no responsive pleading is on file in the instant case. The Clerk (A. Pope), as well as the Trial Court, continuously refused to correct this serious

error despite the Petitioner's persistent requests in several of his pleadings filed with said District Court. (See Z/5, pp. 161a -163a).

The Court of Appeals not only proceeded improperly in not resolving all matter of doubt in favor of the Petitioner and accepting the Defendants' allegations as truth (facts), but instead they proceeded in a biased manner as advocates in favor of the Defendants, as demonstrated in several already presented instances. Additional evidence in this regard is said Court's acceptance of the Defendants' allegations as its own and presenting them after modifying them so as to appear less absurd, as shown by the following. While the Defendants Administration and Faculty - as shown above (p. 13) - alleged the Petitioner's Complaint to be "an incomprehensible, . . . unclear, . . . pleading consisting of . . . immaterial, . . . and scandalous matter . . . in violation of the Federal Rules of Civil Procedure and beneath the dignity of this

Honorable Court . . . /emphasis added/" (Defendant Lawyers alleged similarly (see above pp. 14-15)), the Court of Appeals, in its above cited (pp. 53-54) allegations, modified the Defendants' allegations in declaring the Petitioner's Complaint as "contain/ing/ irrelevant comments and claims, and is so confusing that responsive pleading would be impossible. The defendants filed a motion to dismiss on that basis." (Emphasis added.)

In addition, it should be pointed out that for certain the Court of Appeals was aware that - contrary to their above cited allegations (pp. 47-48) - Rule 12(b)(6) of the Federal Rules of Civil Procedure cannot logically be applied unless the basic assumption of the truth of the complaint is made. A Motion to Dismiss is a preliminary matter, made in the case prior to the filing of an answer which would have clearly put the same case in issue. In effect, what the Defendants' Motions to Dismiss seek is to have the Petitioner denied access to the Court with-

out even an opportunity to present his evidence to the trier of fact. All such motions to dismiss for failure to state a claim (under F.D.R.C. 12(b)(6) are viewed with disfavor by the Court and should only be granted in the most clear cases. Madison v. Purdy, 410 F.2d 99 (5th Cir. 1969); Swartz v. Eberly, 212 F.Supp. 32 (E.D. Pa. 1962). The only requirement for a complaint is a "short, plain statement of the claim showing the pleader is entitled to relief" as stated in the Rule of Civil Procedure 8(a)(2). this rule only called for

> "pleadings in a federal court action to indicate that if the allegations in the complaint are established, the pleader is entitled to relief under the substantive law of jurisdiction. 5 Wright & Miller, Federal Practice and Procedure, Civil § 1204 (1969)".

Regarding the Court of Appeals' above cited (on p. 48) allegations under title "B. Submission of the case to a Magistrate", the Court of Appeals distorted the truth in declaring that

> "/1/ Plaintiff contends that the district court erred in referring the case

to the United States Magistrate without his consent. /2/ The district court properly followed the procedure procedure in 28 U.S.C. § 636(b)(1)(B).. . .."

In confronting the above allegation (number /2/) with the pertinent facts presented above (pp. 22, 25-31) and in his pleadings (see App. A/5, pp. 153a-164a), one is bound to conclude that this allegation represents an instance of irresponsible and offensive calumny which could be understood to have been made with malicious design to present the Petitioner as completely irrational. It appears even more offensive when one becomes aware that the improper involvement of said Magistrate in the instant case has been shown to the Court of Appeals in the Petitioner's aforementioned "Brief For Plaintiff Appellant" (pp.34-36, 38). Contrary to the Court of Appeals' false and calumnious allegations just cited, the Petitioner sufficiently demonstrated above (pp.22, 25-31) that said Magistrate was not authorized, under the circumstances in the instant case, to conduct hearings on the Defendants' dis-

positive pretrial Motions to Dismiss and to propose "findings of the facts and conclusions and recommendations under 28 U.S.C. §§ 636(b) and (c) without consent of the parties.

Contrary to the Court of Appeals' above cited (pp.48-49) allegations under the title "C", subtitles (3), (4) and (5), the Petitioner sufficiently demonstrated in his Complaint the existence of a continuing civil conspiracy directed against him under U.S.C. §§ 1983, 1985 and 1986 engaged in by all Defendants, and that the Petitioner's other claims against all Defendants are closely interrelated and stem from this same conspiracy; in other words (as indicated above pp.9-11), among the multiple causes of action presented in the Petitioner's complaint, a continuing civil conspiracy is the pivotal one. Therefore, as stated above (pp.34-35), to file an amended complaint without claim of conspiracy as ordered by the Trial Court's order of March 3, 1981 (see App. F, pp.34a-35a) would result in an enormous loss for the Petitioner because such an amendment of his complaint would strike a vital

blow to the Petitioner's whole action. To render it possible that this Most Honorable Court directly determine the validity of the Petitioner's claim regarding the existence of the above described conspiracy in the instant case, the Petitioner made a great effort and sacrifice in appending some very relevant extended excerpts from the Petitioner's complaint (see App. Y, pp.73a-79a; App. Z, pp.80a-131a, App. Z/1, pp.132a-135).

The above cited (p.50) allegations, regarding "the district court/'s/ grant/ing of/ the defendants' motion to dismiss for failure to amend the complaint (nine months after the Court's order to amend the complaint)" is erroneous; there was no such motion, in the instant case, filed by any of the Defendants. As shown above (pp.36-37), on November 25, 1981, Defendant Administration and Faculty filed their "Motion For Judgment On The Pleadings For Failure To State A Claim Upon Which Relief Can Be Granted"; in it those Defendants, pursuant to Rule 12(c) and (h) F.R.C.P. . . . requested the Court to enter Judgment on the

Pleadings on the ground that . . . /the Petitioner/ (had) failed to state a claim . . .." These Defendants were aware, as was the Trial Court, that - at that state of pleadings in the instant case - Rule 12(c) and (h), supra, could not serve as proper grounds for filing the Defendants' such Motion. Rule 12(c), supra provides in its relevant part:

> "After the pleadings are closed . . . any party may move for judgment on the pleadings." (Emphasis added.)

The instant case was not closed at that time. (See App. Z/6, pp.166a-168a, 177a-180a.)

What has already been presented in the instant Petition is sufficient to show convincingly that, taken as a whole, in their proceedings, the Trial Court of Appeals manifested "a serious departure from established procedure,"* within the meaning of Rule 17(a) of

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*ABA Commission on Standards of Judicial Administration, Tentative Draft of Standards Relating to Appellate Courts, § 3.11, p.21 (1976), cited by Richard Y. Holcomb, "Standards of Review," in Sec. B.2, Appellate Advocacy - Source Book, American Bar Association, Paul Marc Sandler, Editor, 1980, p.7.

this Court, and that their proceedings and decisions, or lack of them, definitely resulted in a "gross miscarriage of justice"* and, for the Petitioner, "a denial of substantial justice."**

At this point in this Petition, it becomes obvious that the management of the judicial administration was not performed by both of said Courts below in a way as to seek truth and justice in accordance with the provisions of Federal Rules of Civil Procedure "to secure the just, speedy and inexpensive determination of the . . . /Petitioner's/ action, "within the meaning of Rule 1 of the latter, but instead they were involved in persistent distortion of the truth and obstruction of justice; it becomes so - particularly through the Trial Court's action and the Court of Appeals' action and sanction in -

1. Granting Defendants' invalid Mo-

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*Thompson v. City of Louisville, supra, p.299.

**ABA Commission on Standard Judicial Administration, op. cit., p.7.

tions to Dismiss (see above, pp.14-21, 51-52, 54-57; also App. Z/3 and Z/4, pp. 139a-151a).

2. In not entering default judgment sought (October 17, 1979) by the Petitioner against Defendants Administration and Faculty (see above pp.13-14, 21, 51-52, 54-55; see also App. Z/3, Z/4, Z/5, pp.139a-151a, 161a-163a);

3. In ordering (March 3, 1981, see App. F, pp.34a-35a) that the Petitioner file an amended complaint (see above, pp.34-36, 59-60; see also App. Z/6, p.166);

4. In denying the Petitioner's "Motion for Determination of the Plaintiff's Entire Case . . .", filed November 24, 1981 (see above pp.35-36);

5. In failing to rule upon the Petitioner's "Motion for Reversal of Amendment of the Court's Order of December 4, 1981" (see above, pp.37-38; see also App. Z/6, pp.167a-168a);

6. In considering the Defendants' "Motion for Judgment on the Pleadings for

Failure to State a Claim Upon Which Relief Can Be Made" (filed November 25, 1981) as a bona fide motion and granting it (see above, pp. 36-37, 40; see also App. Z/6, pp. 166a-168a)

(7) In entering, on December 7, 1981 "in light of plaintiff's failure to amend (his complaint), . . . a /Trial Court's/ final order of Dismissal" (see App. C, pp. 24a-25a) and in declaring in its judgement (App. O, pp. 53a-54a):

> "This action came on for (hearing) before the Court, Honorable Allen Sharp, United States District Judge presiding and the issues having been duly (heard) and a decision having been duly rendered,
> It is ordered and abridged that . . . this case is dismissed . . ." (emphasis added)

even though - contrary to this declaration - this action was dismissed without

> "(coming) on for (hearing) before the /said Trial/ Court /during which/ . . . /said/ Judge /would be/ presiding and /during which/ the issues would have been duly (heard) . . . /and therefore said/ decision /has not/ been duly rendered."

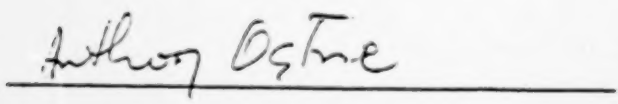
(8) In declaring, by the Court of Appeals,

that the District Court did not abuse its discretion; the Petitioner clearly showed the contrary in his pleadings, in particular in his aforesaid Brief (pp. 38-40), Reply Brief (pp. 17-25), Petition for Rehearing in Banc (pp. 9-10). In several other pleadings, the Petitioner demonstrated clearly that the Trial Court did abuse its discretion, but in particular in his aforesaid Motion For Relief From Judgment (see App. Z/6, pp. 168a-180a).

CONCLUSION

For these reasons, a writ of certiorari should be granted.

Respectfully submitted,



Anthony Ostric, Petitioner, pro se

August 22, 1983

NUMBER: _____

IN THE SUPREME COURT OF THE UNITED STATES

ANTHONY OSTRIC, Petitioner,)
)
v.)
) AFFIDAVIT
THE CORPORATION OF ST.)
MARY'S COLLEGE, NOTRE)
DAME, ET AL., Respondent.)

Anthony Ostric, being duly sworn under oath, does hereby state that he is the Petitioner of the above entitled cause; that he has read the foregoing PETITION FOR WRIT OF CERTIORARI and the affirmations therein are true and correct and the presentation of the statement of facts is made upon the Petitioner's personal knowledge of said facts.

Anthony Ostric

Anthony Ostric, Petitioner, pro se

Subscribed and sworn to before me this 22 day of August, 1983

Notary Public

My commission expires:

Feb. 13, 1986

NUMBER:_____

IN THE SUPREME COURT OF THE UNITED STATES

ANTHONY OSTRIC, Petitioner,

v.

THE CORPORATION OF ST. MARY'S COLLEGE, NOTRE DAME, ET AL., Respondent.

PROOF OF SERVICE

Anthony Ostric, being duly sworn upon his oath, states:

1. That he is the Petitioner,

2. That on the 24th day of August, 1983, he delivered personally three copies of the foregoing PETITION FOR WRIT OF CERTIORARI, with the Affidavit attached to it to:

R. Kent Rowe
900 St. Joseph Bank Bldg.
South Bend, IN 46601

Vincent Campiti
220 West Jefferson Blvd.
South Bend, IN 46601

and forwarded by First Class Mail, postage prepaid to:

George B. Huff, Jr.
Deputy Attorney General
State of Indiana
219 State House
Indianapolis, IN 46204

Anthony Ostric

Anthony Ostric, Petitioner